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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HELFF INVESTMENTS,

Plaintiff and Appellant,

v.

PACIFICA COMPANIES, LLC, et al.,

Defendants and Appellants.

D059468

(Super. Ct. No.  
37-2008-00097744-CU-BC-CTL)

APPEALS from a judgment of the Superior Court of San Diego County, David B. Oberholtzer, Judge. Affirmed in part; reversed in part; and remanded.

I

INTRODUCTION

Plaintiff Helf Investments (Helf) appeals a judgment in favor of defendants Pacifica Companies, LLC, and related entities (collectively Pacifica), in a breach of contract action. After a bench trial, the court determined Pacifica breached its contract with Helf in which Pacifica had agreed, as partial consideration for its purchase from

Helf of a 200-unit apartment complex, to pay to Helf as additional deferred consideration 50 percent of any revenues received by Pacifica from sales of units created on conversion of the apartments to condominiums, to the extent those sales exceeded a stated threshold amount and were realized within a specified period of time (the deferred consideration period). Pacifica successfully sold 191 of 200 units in the converted condominium complex during the deferred consideration period, and Helf received more than \$1.2 million in additional payments pursuant to the contract. After October 1, 2008, however, Pacifica did not have a sales agent actively marketing the units. Moreover, throughout the deferred consideration period, it had purposefully withheld one unit from sale so it could lease that unit and thereby maintain a presence on the homeowner's association board of directors. The remaining nine units did not sell until after the deferred consideration period expired.

The trial court determined that Pacifica breached its contract with Helf as to eight of the unsold units by not having a sales agent on site during the last three months of the deferred consideration period. However, the trial court did not award damages for that breach, finding Helf did not meet its burden of proving the eight units would have sold by the end of that period had Pacifica not breached the contract. As to the ninth, leased unit, the trial court found Pacifica breached its contractual obligations by withholding this unit from its sales listings and never actively marketing it. For that breach, as well as for Pacifica's not making timely payments of deferred consideration to Helf (not at issue here), the trial court awarded Helf damages in the total amount of \$130,357.56 plus interest.

Helf appeals the first of these rulings. It contends the trial court erroneously held inadmissible evidence that, during the deferred consideration period, Helf offered to purchase all the remaining unsold units at a 30 percent discount from their list prices. Helf argues the evidence of its offer not only demonstrates Pacifica's breach caused Helf's injury, but also provides a measure for its damages. The trial court excluded this evidence for two principal reasons. First, the court found Helf's offer and the parties' communications that followed the offer constituted settlement negotiations, which are inadmissible under Evidence Code section 1152, subdivision (a).<sup>1</sup> Second, the trial court held that Helf's offer was not the type of offer contemplated by the parties' contract, and Pacifica therefore could not reasonably have foreseen refusing that offer would render it liable for damages.

Pacifica cross-appeals from that portion of the judgment awarding damages to Helf as to the ninth, leased unit. It contends that because Helf did not prove causation as to eight of the unsold units, there was also no substantial evidence supporting the trial court's conclusion that causation was proved as to the ninth unit.

We conclude the trial court erroneously excluded evidence of Helf's offer to purchase the remaining units, and we reverse that portion of the judgment relating to eight of the unsold units, and remand for a new trial limited to the question of damages as to those units. We further conclude the trial court's finding that the ninth, leased unit was differently situated than the others because Pacifica had foreclosed even the possibility of

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<sup>1</sup> All further statutory references are to the Evidence Code unless otherwise specified.

it being sold is supported by substantial evidence and by the inferences that reasonably may be drawn from that evidence, and affirm that portion of the judgment.

## II

### FACTUAL AND PROCEDURAL BACKGROUND

This summary of the facts of this case is drawn principally from the trial court's statement of decision.<sup>2</sup>

#### A. The Parties' Contract

Helf Investments is a family limited partnership that owned a 200-unit apartment complex in Milpitas, California, known as Indian Hills Apartments. In October 2005, Pacifica, an investment company owning multiple properties, agreed to purchase the complex for \$45.2 million, and planned to convert the rental units to residential condominiums for sale after renovations. Pacifica determined after its due diligence, however, that its sales projections and other factors did not support the purchase price, and elected to terminate the purchase agreement.

During subsequent negotiations, Helf proposed to sell the complex to Pacifica for \$41.2 million, together with an arrangement pursuant to which Pacifica would share with Helf a portion of Pacifica's revenues from sales of the condominiums if those revenues exceeded a certain sum. Pacifica accepted this proposal, and on December 15, 2005, the

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<sup>2</sup> After the trial court issued its statement of decision, it wrote to counsel advising them it discovered a number of minor errors. Although the court denied Helf's motion to correct those errors apparently because the notice of appeal had been filed in the interim, these errors are inconsequential and typographical in nature, and there is no dispute as to what the trial court actually intended. We therefore view the statement of decision as though these errors had been corrected by the trial court.

parties entered into the "Reinstatement and Second Amendment to Agreement for Purchase and Sale and Joint Escrow Instructions" (the Purchase Agreement).

The revenue-sharing provisions of the Purchase Agreement provided that "[i]f and to the extent that Gross Sales Proceeds exceed[] \$61,500,000.00, [Pacifica] shall pay to [Helf], as additional consideration for the sale of the Property, an amount equal to 50 percent of such excess, up to a total additional payment to [Helf] of \$2,300,000.00 (the 'Deferred Contingent Consideration')." This deferred consideration clause had a sunset provision, added at Pacifica's request. The deferred consideration period commenced with the first sale of a condominium unit, and ended on the second anniversary of that sale. "If all Condo Units have not been sold as of the second anniversary of the sale of the first Condo Unit, then . . . [Pacifica] shall have no further obligation to . . . make payments of Deferred Contingent Consideration for the calendar months following the month in which the second anniversary of the sale of the first Condo Unit occurs."

The Purchase Agreement further obligated Pacifica to provide monthly reports of its aggregate gross sales proceeds and, after the \$61.5 million threshold had been reached, to include a payment for the deferred consideration owed to Helf for sales made during each month. The term "Gross Sales Proceeds" was defined as the "aggregate gross sales price for the Condo Units," less incentives granted to a purchaser, but only if those incentives were "the equivalent, from [Pacifica's] perspective, of a discount to the purchase price . . . or a payment to such purchaser's lender on purchaser's behalf . . . , provided that such amounts are specifically described as separate line items on the escrow closing statement for such Condo Unit."

Importantly for purposes of this appeal, the Purchase Agreement required Pacifica to "use its good faith best efforts to sell all Condo Units in arm's-length transactions as promptly as reasonably possible." Herbert J. Solomon, Helf's manager, testified this provision was added to "raise the standard as high as we could to impose on Pacifica the obligation to sell all the units in [arm's-length] transactions," rather than "to their affiliates or . . . to their employees or their friends at some bargain price." Although Solomon testified this provision required Pacifica to use not just ordinary best efforts, but good faith best efforts that went beyond merely the standard language in a contract, he also acknowledged Pacifica was not required to do everything possible to sell all the units by the end of the deferred consideration period.

B. Pacifica's Performance Under the Purchase Agreement

Pacifica undertook renovations of the project, renamed it "Crossroads," and hired The Mark Company as the real estate broker charged with marketing the condominiums. Pacifica sold the first condominium on December 20, 2006, making December 20, 2008, the expiration date of the deferred consideration period. During the 16 months following this first sale (until April 28, 2008), Pacifica sold 191 of the 200 units. However, Pacifica did not send reports and payments to Helf in a timely manner, as required by the Purchase Agreement. The first condominium sale closed in December 2006, but Pacifica did not send its first report until June 2007. Pacifica's sales exceeded the \$61.5 million threshold by January 2008, which triggered the first deferred consideration payment, but no payment was sent with the report showing that payment was due. Despite Helf's

demand for payment, Pacifica did not send Helf its first payment until June 2008, when it mailed Helf a \$1,065,129.50 check.

The sale of the 191st condominium unit closed in April 2008, and in August, Helf received another untimely check for \$150,542 in deferred consideration.<sup>3</sup> By that time, however, the market for condominiums had softened considerably and did not appear to be improving. The remaining unsold nine units were among the least desirable in the complex, because of their locations facing busy streets or a freeway. Pacifica sought to sell the remaining nine units through additional, aggressive incentives. All of these units were placed in escrow at least once in 2008. However, these sales did not close, apparently because credit had tightened and purchasers could not obtain loans, but also because some incentives had not been approved.

Because there were no sales after April 2008, Helf urged Pacifica to be more proactive in its marketing efforts. Solomon met with Deepak Israni, Pacifica's managing partner, in July 2008, to discuss its marketing plans. In September 2008, Pacifica reduced its list prices for the remaining two- and three-bedroom condominiums. Israni testified that he decided to reduce prices to keep Pacifica's units competitive in the market. Notwithstanding these efforts, the remaining nine units did not sell before the end of the deferred consideration period. Additionally, Pacifica continually held one unit

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<sup>3</sup> Pacifica was also late in paying an additional \$4,811.86 in deferred consideration, not paid until April 2009. At trial, Helf was awarded interest on the second and third late payments. Neither party has appealed that aspect of the judgment. In addition to late reports and payments, Helf became concerned about Pacifica's treatment of various incentives and fees that Helf believed did not conform to the Purchase Agreement's provision regarding such incentives. That issue also is not pertinent to this appeal.

as a rental to maintain a presence on the homeowners' association board of directors and, consequently, that unit was never listed for sale during the deferred consideration period (although Pacifica had told The Mark Company it would entertain any offers made on the unit).

On October 6, 2008, Helf made an unconditional offer to purchase all nine of the remaining unsold units for 70 percent of their list prices, in cash and with a closing in two weeks. This amounted to a purchase price of approximately \$2.1 million. Had Pacifica accepted that offer, Helf's share of deferred consideration would have been approximately \$1.05 million. In the written offer, Helf stated its purpose was to "conclude [Helf's and Pacifica's] relationship on a harmonious note" and avoid "any future controversy regarding Helf's full entitlement." Pacifica rejected this offer, but made a counteroffer that Helf purchase the remaining units for 90 percent of the list prices, which Helf rejected. During the course of further communications, the parties considered an agreement pursuant to which Pacifica would either sell the units to Helf at 75 percent of their list prices, or would make a payment to Helf as though Pacifica had sold the units to a third party for 65 percent of the list prices. These negotiations included discussions of a release, but the parties apparently could not reach agreement on its terms. Pacifica declined Helf's final offer of 70 percent, and Helf declined Pacifica's offer of 75 percent. A deal was never consummated.

Having made no sales for many months, The Mark Company lost its enthusiasm for selling at Crossroads, and on October 1, 2008, its agreement with Pacifica expired. Although another sales agent, Rick Finamore of Finamore Realty, had been identified by

Pacifica as a possible successor sales agent, neither Finamore nor any other broker was retained to market the remaining nine units between October and December 2008. No sales agent was present at Crossroads to take an offer during that time, even had one been made. Finamore finally became the Crossroads sales agent on December 9, 2008, shortly after Helf conveyed to Pacifica its final rejection of Pacifica's counteroffers. Israni testified he did not retain Finamore earlier because the negotiations over Helf's offer were then ongoing, and had Helf's offer been accepted, Finamore would have been entitled to a commission on the transaction.

Even before he had been formally retained, Finamore recommended to Pacifica that it lower its asking prices on the remaining units to sell them. After he was retained, Pacifica acted on Finamore's advice. The asking prices of the units--except for the leased unit--were lowered as of January 2009. Six of the remaining units were sold in February 2009, one was sold in March and one was sold in April 2009. Escrow closed on two of those units on March 27, 2009, and on the other six units by early June 2009. The last unit--the two-bedroom unit Pacifica withheld from sale and leased--was not included in the original listing with Finamore, and it did not sell until November 2009.

#### C. The Trial Court's Exclusion of Evidence Regarding Helf's Purchase Offer

On December 10, 2008, Helf filed suit against Pacifica for breach of the Purchase Agreement, alleging Pacifica had "failed to use its good faith best efforts to sell the last nine remaining condominium units," as required by the Purchase Agreement.

Before trial, Pacifica moved in limine for an order excluding any evidence or argument regarding the "parties' efforts to settle the legal dispute that culminated in this

litigation." Pacifica sought to preclude Helf from presenting at trial evidence of its offer to purchase the remaining nine units, as well as evidence of all subsequent negotiations, including Pacifica's rejection and counteroffer. Pacifica based its motion on section 1152, subdivision (a), regarding the nonadmissibility of evidence relating to settlement discussions. Pacifica maintained the parties' negotiations regarding how to bring their contractual relationship to a close were not arm's-length negotiations between a willing seller and a willing retail buyer, but rather were designed to avoid a lawsuit. Helf opposed this in limine motion on the ground that its offer was no different than any other offer, did not pertain to settlement as there was no dispute between the parties at that time and, in any event, would not be introduced to prove the liability of the offeror (Helf), and thus was outside the scope of section 1152, subdivision (a).

The court granted Pacifica's motion, stating several reasons for its decision. First, it ruled the offer inadmissible under section 1152, subdivision (a), because, in the court's view, it clearly anticipated litigation. The court then stated that even if section 1152 does not by its terms apply when a "settlement" offer is introduced to show the offeree's, rather than the offeror's, liability, "the philosophy and the reason for [section] 1152" compelled exclusion of the evidence. The court reasoned that if it admitted evidence of Helf's offer, that would force Pacifica to introduce evidence of its response and counteroffers, thereby "leverag[ing Pacifica] into presenting evidence that [it] wouldn't otherwise have to present to the jury." Additionally, the court noted Helf's discounted bulk offer was "not something that was contemplated by the parties when they entered into the contract."

#### D. The Trial Court's Decision After Trial

A bench trial was held in February and March 2010.<sup>4</sup> Helf pursued two main theories at trial regarding Pacifica's failure to use its "good faith best efforts" to sell the remaining condominiums. First, Helf maintained that if Pacifica had lowered its prices for the condominiums earlier in 2008, it would have sold the remaining nine units before the end of the deferred consideration period. Second, Helf argued that Pacifica breached the Purchase Agreement by not having a sales agent on site during the closing months of the deferred consideration period.

After trial, the court issued an oral ruling from the bench. Pacifica requested a statement of decision, but did not prepare one as directed by the trial court. Therefore, Helf submitted a proposed statement of decision that diverged significantly from the trial court's oral ruling, prompting Pacifica to submit its version for the court's approval. The trial court ultimately prepared its own statement of decision, but did not issue it until December 13, 2010.

With respect to the pricing issue, the trial court found that "[i]n retrospect, [Helf] was right--the prudent course for Pacifica would have been slashing prices during the summer of 2008 to sell out the project. Given the information available at the time, however, Pacifica's marketing was adequate and commercially reasonable, if unimaginative." "[Helf] argued (correctly) Pacifica should have . . . lowered [its] prices and increased incentives more and sooner than it did, but Pacifica's steady reduction in

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<sup>4</sup> The parties initially intended to have a jury trial, but for reasons not explained on appeal, a bench trial was held instead.

prices was not a failure to use good faith best efforts[;] it was a mistake." The trial court found "Pacifica did not breach its contract with [Helf], under the circumstances, from January 2008 to [October 1], 2008[.]"

The trial court did find that Pacifica breached the Purchase Agreement "by not having a sales force in place between October 1 and December 20, 2008." Helf, however, "did not prove with reasonable certainty the other eight units would have sold and closed before December 20, 2008, a necessary predicate to recovery. The law permits some uncertainty in proving the amount of damages, but uncertainty in the fact of damages is fatal." Therefore, the trial court did not award any damages for Pacifica's breach of the Purchase Agreement as to eight of the units not sold before the end of the deferred consideration period.

The trial court concluded, however, that the ninth, leased unit presented a different situation, because "Pacifica deliberately removed [that unit] from the market." Although Pacifica argued there was insufficient evidence that the ninth unit would have sold before December 20, 2008, the trial court stated it "will resolve the uncertainty against Pacifica." To calculate the amount of damages, the trial court considered the prices at which several two-bedroom units sold in February 2009. After deducting closing costs and incentives, the court calculated Helf's damages for Pacifica's breach in connection with the ninth unit (i.e., lost deferred consideration) to be \$105,225.50, plus prejudgment interest. The court also awarded interest on the final two late deferred consideration payments to Helf. The final judgment awarded damages to Helf in the amount of \$130,357.56, plus interest, costs and attorney's fees.

In its statement of decision, the trial court also reaffirmed its prior ruling excluding evidence regarding Helf's October 2008 offer to purchase the remaining nine units, along with evidence of the parties' subsequent negotiations. The court found that even though "everyone would have been better off [had] Pacifica . . . agreed to the buyout" proposed by Helf, section 1152, subdivision (a), barred this evidence because the offer "obviously *was* an attempt to compromise as a way of avoiding this lawsuit." The court observed that even if Helf was not trying to prove the liability of the offeror (Helf), but rather of the offeree (Pacifica), it found the important evidence was not so much Helf's offer as Pacifica's rejection of that offer, which evidence "goes directly to Pacifica's liability." Moreover, the court noted that even had it admitted evidence of Helf's offer, it would have also admitted evidence of Pacifica's counteroffer, "which was also reasonable." Finally, the trial court concluded Pacifica's refusal of Helf's offer "was not an injury to [Helf] within the contemplation of the parties when they signed the contract." "Pacifica would not, in the ordinary course of things, . . . have expected to pay [Helf] as damages the amount of the offer it [turned] down."

### III

#### DISCUSSION

##### A. Evidence Relating to Helf's Offer

Helf focuses its appeal on its contention that the trial court erred in excluding evidence of its October 6, 2008, offer to purchase the remaining nine units. We agree section 1152 is inapplicable to Helf's offer, because no dispute existed between the parties at the time that offer was made, and excluding the evidence in this case does not

further the purposes of that statute. We further conclude this error was prejudicial to Helf, because it provided evidence of causation the trial court found missing. We will not speculate, however, as to how the trial court might have ruled on the damages issue had this evidence been admitted, and so we remand for a new trial on that issue as to eight of the unsold units.

### 1. *Standard of Review*

"In determining the admissibility of evidence, the trial court has broad discretion." (*People v. Williams* (1997) 16 Cal.4th 153, 196.) "On appeal, a trial court's decision to admit or not admit evidence, whether made *in limine* or following a hearing pursuant to . . . section 402, is reviewed only for abuse of discretion." (*Id.* at p. 197; *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476 (*Zhou*); see also *Caira v. Offner* (2005) 126 Cal.App.4th 12, 31-32 (*Caira*).) To the extent the trial court's ruling is based on statutory interpretation, however, its determination will be reviewed de novo. (*Zhou*, at p. 1476.)<sup>5</sup>

### 2. *Section 1152 Does Not Apply to Helf's Offer*

Section 1152 provides, in relevant part: "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money . . . to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in

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<sup>5</sup> Pacifica also contends this issue may be reviewed for substantial evidence, because the trial court made certain factual findings in connection with its evidentiary ruling--for example, that Helf's offer was an offer in compromise.

negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it." (§ 1152, subd. (a).) According to the Law Revision Commission, "[t]he rule excluding offers is based upon the public policy in favor of the settlement of disputes without litigation. The same public policy requires that admissions made during settlement negotiations also be excluded." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (2009 ed.) foll. § 1152, p. 456.) " 'The rule prevents parties from being deterred from making offers of settlement and facilitates the type of candid discussion that may lead to settlement.' " (*Zhou, supra*, 157 Cal.App.4th at p. 1475; see also *Caira, supra*, 126 Cal.App.4th at p. 32.) "Evidence should be excluded under . . . section 1152 where 'The strong public policy favoring settlement negotiations and the necessity of candor in conducting them combine to require exclusion . . . .' " *Caira*, at p. 33.)

Initially, we note evidence of Helf's October 6, 2008, offer to Pacifica to purchase the remaining unsold units was not proffered to prove Helf's liability for any loss or damage that Pacifica "sustained or will sustain or claims that [it] has sustained or will sustain." (§ 1152, subd. (a).) Further, neither Helf's offer, nor Pacifica's nonacceptance of that offer and its counteroffer, constituted admissions of liability to the other party. The literal terms of section 1152, subdivision (a), therefore do not appear to be applicable as a basis of excluding evidence of Helf's offer. In any event, we conclude Helf's offer was not inadmissible as a compromise of an existing dispute.

It is not necessary, for section 1152 to apply, that the parties already be involved in litigation at the time of the negotiations in question. (See, e.g., *Georgia-Pacific Corp. v. California Coastal Com.* (1982) 132 Cal.App.3d 678 at p. 693 [compromise was

offered during administrative proceedings that preceded lawsuit].) In most instances in which section 1152 has been applied, there is at least an existing dispute between the parties. (See, e.g., *Caira, supra*, 126 Cal.App.4th at p. 34 [at time e-mail at issue was sent, the parties "were attempting to resolve several interrelated disputes" regarding company stock]; see also *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 13 [settlement negotiations occurred in connection with dispute over bid for construction work]; *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 481, fn. 3 [letters discussing plaintiffs' obligations under a contract were admissible because nothing suggested there was any dispute regarding such obligations at the time the letters were written].) Nevertheless, there is some authority for the proposition that an actual dispute need not exist between the parties, so long as the offer was made at a time when the other party's future loss is a certainty. (See *Mangano v. Verity, Inc.* (2009) 179 Cal.App.4th 217, 222 [affirming exclusion of evidence of severance offer made by employer to terminated employee when the fact of the employee's future loss of income resulting from termination was certain at time offer was made].)

In this case, as both Pacifica and the trial court appeared to acknowledge, there was no *existing* dispute between the parties at the time Helf made its unconditional offer to purchase the remaining units. Helf made the offer because it knew Pacifica had made no sales in months, and it could see that economic conditions were worsening. At that time, more than two months remained before the deferred consideration period expired. Pacifica had not repudiated the contract, and Helf had not yet accused Pacifica of any breach. No claim or lawsuit was then pending. Helf presented a proposal to Pacifica to

purchase the remaining units at what it viewed to be a fair price in the context of existing conditions, simply to help ensure that it would receive the maximum possible benefit from the deferred consideration provisions of the Purchase Agreement. As Helf argues, it made the offer to "facilitate[] full contractual performance," rather than to *compromise* the parties' respective rights and obligations under the Purchase Agreement. In our view, Helf's offer, Pacifica's counteroffer, and the parties' communications regarding the same are not materially different in their essential nature from negotiations Pacifica might have had with other potential buyers and, indeed, Pacifica acknowledged it already had entertained a bulk offer to purchase multiple units.<sup>6</sup>

Pacifica contends, however, and the trial court found, Helf made its offer to avoid a future lawsuit over whether Pacifica had satisfied its "good faith best efforts" obligation under the Purchase Agreement. Pacifica relies in particular on *Mangano, supra*, 179 Cal.App.4th 217, in which the court observed that "nothing in the language of . . . section 1152 . . . limits it to offers to compromise preexisting *disputes*." (*Id.* at p. 222.)

*Mangano*, however, is distinguishable. In that case, the employer's severance offer was

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<sup>6</sup> That the parties already were in a contractual relationship and discussed a release in connection with Helf's potential purchase of the remaining units does not alter our analysis. Business deals commonly involve releases or limitations on liability, but that does not turn every business negotiation into a settlement discussion. Nor are we troubled by the fact that at one point Pacifica offered to either sell the units to Helf at 75 percent of list price, or make a deferred consideration payment to Helf as though it had sold the units to a third party at 65 percent of list price. This evidence merely demonstrates that, faced with the nearing December 20, 2008, deadline, the parties were attempting to find a way to close their contractual relationship in a mutually beneficial way. Although they did not do so successfully, and their relationship soured over the course of their discussions, that is not enough to convert a business negotiation into excludable settlement talks.

made at a time when "it was a fact that Mangano's termination would cause him to sustain some loss of income." (*Ibid.*) In this case, by contrast, the *fact* of loss to Helf was not certain at the time Helf made its offer. If Pacifica refused Helf's offer, which it did, there was still time for Pacifica to either try to strike a different deal with Helf or market the units to other buyers, because the deferred consideration period did not expire until December 20, 2008.

Our conclusion is not undermined by the evidence indicating that, after the parties' negotiations over a possible sale broke down, the tone of Helf's communications became more antagonistic, and by December 8, 2008--when it was apparent that no new sale likely could be finalized by the close of the deferred consideration period, and Pacifica had made no other efforts to market the remaining nine units--Helf was accusing Pacifica outright of breaching its obligations under the Purchase Agreement. Contrary to Pacifica's assertions, however, we do not see Helf's original offer and Pacifica's counteroffers as part of an inseparable group of settlement communications. Rather, we would characterize the parties' communications as, initially, a negotiation over a possible sale, not unlike other negotiations Pacifica may have had with potential buyers, and later as a demand by Helf for monies it believed it was entitled to under the parties' agreement--none of which are the types of communications covered by section 1152, subdivision (a). (See, e.g., *Zhou, supra*, 157 Cal.App.4th at p.1477 ["a letter itemizing what the sender thinks the recipient owes him or her and demanding payment, even under threat of legal action, is, in effect, a bill and not an offer in settlement or a document in settlement negotiations excludable under section 1152"].) Pacifica cites no case in which

an appellate court affirmed the exclusion of evidence under section 1152 of what amounts to an unsuccessful negotiation of a possible business deal.<sup>7</sup>

We also do not believe exclusion of the October 6 Helf offer (and the communications that followed) advances the policy concerns underlying section 1152. As noted, the function of the statute is to promote candor in settlement negotiations. (*Zhou, supra*, 157 Cal.App.4th at p. 1475; *Caira, supra*, 126 Cal.App.4th at p. 32.) The exclusion not only of the offer itself, but also "any conduct or statements made in negotiation thereof" (§ 1152, subd. (a)), was intended to end the prior practice of allowing certain statements made during negotiations to be used as admissions against a party. (See *Caira*, at p. 32.) These laudable goals are not endangered, however, where the purported "offer of compromise" and the ensuing discussions constitute, in essence, negotiations of a possible deal conducted in the ordinary course of business. The fact these discussions were unsuccessful, and a lawsuit ultimately was commenced, does not convert those discussions into "settlement negotiations."

### *3. The Trial Court's Error Was Prejudicial*

It is not sufficient for Helf to demonstrate error on the part of the trial court. To warrant reversal, Helf must also show the trial court's error was prejudicial. "[I]njury is

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<sup>7</sup> That the parties' communications regarding Helf's offer bore the characteristics of an ongoing business negotiation is also demonstrated by Pacifica's later admission that it did not immediately hire Finamore as a replacement sales agent because it believed Finamore would be entitled to a commission on any sale finalized between the parties (as he would be for any retail sale consummated at Crossroads in the normal course of business). If these discussions were, in fact, settlement negotiations, Pacifica fails to explain why Finamore would be entitled to a commission on a settlement of a legal dispute.

not presumed from error but must be affirmatively shown [citation], which principle is also embodied in the harmless error rule [citations]." (*Continental Dairy Equip. Co. v. Lawrence* (1971) 17 Cal.App.3d 378, 384; see also § 354; Code Civ. Proc., § 475.) The California Constitution prescribes: "No judgment shall be set aside . . . on the ground . . . of the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "[A] 'miscarriage of justice' should be declared only when the court . . . is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) " 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' " (*Cassim v. Allstate Insurance Co.* (2004) 33 Cal.4th 780, 800.)

Helf contends it was "reasonably probable" that admission of the disputed evidence would have led to a larger damages award to Helf because it would have provided the evidence the trial court found missing as to eight of the nine unsold units-- i.e., evidence of causation and damages resulting from Pacifica's breach. We agree the excluded evidence is relevant to the causation issue because it tends to show there was a willing buyer for all nine of the remaining units, and the units would have sold by the end of the deferred consideration period had Pacifica not breached the contract. Had Pacifica timely hired Finamore (who, in early November 2008, recommended Pacifica further lower its prices), Finamore might well have recommended that Helf's offer be accepted.

There is, in our view, at least a reasonable chance that if the trial court had admitted evidence relating to Helf's offer, and considered that evidence together with evidence showing eight of the units eventually were sold at net prices less than what Helf offered, it may have determined Helf established causation as to eight of those remaining units.

Pacifica argues Helf suffered no prejudice, even assuming it was error for the trial court to exclude evidence of its 70 percent purchase offer, because the trial court also deemed Pacifica's 75 percent counteroffer to be "reasonable," thereby refuting Helf's assertion that the outcome would have been different had evidence of Helf's offer been admitted. This argument, however, is premature. None of this evidence was admitted and, therefore, the relevant facts and circumstances of the parties' negotiations were never tested, as Helf puts it, "in the crucible of trial." Pacifica presents no authority for the proposition that the prejudicial effect of an erroneous evidentiary ruling may be determined based solely on the court's speculation as to how it might have viewed or weighed the excluded evidence had it been admitted. Because we do not engage in that speculation ourselves, we reverse and remand for a new trial on the question of damages as to eight of the units that remained unsold at the end of the deferred consideration period.<sup>8</sup>

We emphasize the limits of our ruling. We do not hold that, on remand, the trial court must conclude Helf has proved *both* causation and damages based on evidence of

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<sup>8</sup> We note that, on remand, the judge presiding over the retrial of the damages issue will not be bound by the prior judge's initial opinions about the weight or value of evidence excluded at trial. (Cf. *People v. Shuey* (1975) 13 Cal.3d 835, 842 [law of the case doctrine "is exclusively concerned with issues of law and not fact"].)

its offer alone. We merely hold it was error for the trial court not to have admitted and considered evidence of Helf's offer. We agree with both Pacifica and the trial court that if Helf's offer is admitted, there is no reason why Pacifica's response and its counteroffers should not also be admitted. In determining the amount of damages resulting from Pacifica's failure to use its "good faith best efforts" to sell these eight units, evidence of Pacifica's counteroffers and Helf's responses thereto would be relevant, for example, in determining whether Helf reasonably acted to mitigate its damages. (See, e.g., 1 Witkin, Summary of Cal. Law: Contracts (10th ed. 2005) §§ 914-915, pp. 1011-1012.) The trial court, on retrial of the damages issue as to the eight remaining units, properly may consider all relevant evidence.

#### *4. Helf's Offer as a Proper Measure of Damages*

The trial court also determined Helf's offer of \$2.1 million (of which Helf would have been entitled to \$1.05 million in deferred consideration) is not a proper *measure* of damages because these were not the types of damages Pacifica reasonably could have foreseen. (Civ. Code, § 3300.) The trial court based its conclusion on its finding that the contract was addressed only to "retail sales," "Pacifica had no obligation to use its good faith best efforts to negotiate a settlement, . . . and did not breach its agreement with [Helf] by refusing its bulk sale offer." It concluded: "Pacifica would not, in the ordinary course of things, . . . have expected to pay [Helf] as damages the amount of the offer it [turned] down."

To the extent the trial court, in so ruling, held bulk sales offers were not contemplated under the Purchase Agreement, we conclude that finding is not supported

by substantial evidence. (See, e.g., Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 8.43, p. 8-22 [trial court's factual findings are reviewed for substantial evidence].) Pacifica concedes the contract does not prohibit "bulk" sales of multiple units. It is undisputed Pacifica entertained a bulk purchase offer earlier in 2008. To the extent the trial court found Pacifica could not reasonably foresee that refusing a "settlement offer" from Helf would expose it to damages, we reject the characterization of Helf's offer as an offer of compromise, for the reasons stated previously. Moreover, Pacifica reasonably had to foresee that rejecting a reasonable offer to purchase--whether "bulk" or otherwise--could well expose it to damages for failing to use its "good faith best efforts" to sell the units, particularly under the circumstances that existed in the final months of the deferred consideration period (i.e., weak market, and little time remaining to close a deal). The fact that the offer came from Helf, rather than some other potential buyer, is not relevant to this foreseeability question.

On retrial of the damages question, the court properly may consider *all* relevant evidence to determine the proper measure of damages, including Helf's offer and Pacifica's counteroffer. With respect to the ninth, leased unit, the trial court began its damages calculation by considering the prices at which other two-bedroom units ultimately sold in first half of 2009. There is no reason why the court may not also consider that evidence in determining damages as to the other eight units.<sup>9</sup>

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<sup>9</sup> In this regard, we note Pacifica appealed the trial court's ruling as to the ninth unit only on the ground Helf failed to prove causation--not on the ground the trial court used the 2009 sales to measure the damages as to that unit. We also observe that Helf's offer,

C. Causation and Damages as to the Ninth, Leased Unit

In its cross-appeal, Pacifica contends the trial court erred by concluding Helf adequately proved causation and damages as to the ninth condominium unit Pacifica deliberately withheld from the sales market and leased instead. Pacifica does not challenge the trial court's finding that Pacifica breached the Purchase Agreement by not actively marketing this unit. Rather, the gist of Pacifica's argument is that the facts regarding causation are exactly the same for the ninth unit as for the other eight units and, thus, the court should have found a failure of proof as to causation regarding the ninth unit as well.

Although we reverse the trial court's failure-of-proof ruling as to the other eight units, we reject Pacifica's argument for another reason. We agree with the trial court that the evidence as to the ninth unit warrants a different causation analysis, and on this basis we affirm that portion of the judgment pertaining to the ninth unit. Because Pacifica's cross-appeal is based on the absence of sufficient evidence supporting the court's factual determination of causation as to the ninth unit, we review that determination for substantial evidence. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912; see also *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

Pacifica correctly points out the unit withheld from the Crossroads sales listings was one of six 2-bedroom units that remained unsold at the end of the deferred consideration period, and, like the other eight units, it had gone into escrow in the second

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Pacifica's counteroffer, and the amount at which the eight units ultimately sold in 2009 were all roughly in the same range.

half of 2008, but the sale never closed. The evidence also showed that although this unit was not actively marketed, it was nevertheless available for sale if someone "came by" and expressed an interest in purchasing it. It is also reasonable to conclude this unit, had it actively been marketed and not sold by the first half of 2008, likely would have been subject to the same adverse economic conditions that impacted Pacifica's ability to close sales of the other eight units in the second half of 2008.

However, the ninth unit in one key respect was *not* similarly situated with the other eight units. As the trial court explained, "the removal of the [ninth unit] from the market foreclosed even the possibility that it would have been marketed and sold.

[¶] . . . [¶] . . . [T]he breach by Pacifica created the problem." The trial court acknowledged Pacifica's objection that there was insufficient evidence showing the unit would have sold before the end of the deferred consideration period, but reiterated in its statement of decision, "Pacifica deliberately removed [the ninth unit] from the market, and the court will resolve the uncertainty against Pacifica."

Pacifica's insistence that the same causation evidence (or lack of evidence) applicable to the other eight units applies equally to the ninth overlooks a key fact. The breach with respect to the ninth unit is not the same as the breach impacting the other eight. Pacifica's breach as to eight of the unsold units was that it had no sales agent actively marketing those units during the closing months of the deferred consideration period. But Pacifica's breach with respect to the leased unit is that it deliberately withheld that unit from its sales listings and *never* actively marketed it. The record, viewed as a whole, justifies the trial court's determination that this one key fact put the

ninth unit in a different category from the other unsold units. Thus, what Helf had to prove regarding causation as to the ninth unit is *not* that it likely would have been sold between October 1 and December 20, 2008, but rather that the ninth unit likely would have been sold *at some point* had Pacifica actively marketed it during the deferred consideration period.

In this regard, it bears noting that Pacifica sold 191 of the 200 units in Crossroads during the first 16 months of that period, before the economic downturn took hold. Given this initial sales success, the trial court reasonably could infer that had Pacifica actively marketed the leased unit, instead of holding onto it to retain a seat on the homeowners' association board, it likely would have sold that ninth unit too, before conditions became unfavorable. There was evidence in the record that, as Pacifica argues, might have supported a different outcome. However, in determining whether substantial evidence supports a trial court's factual finding, we consider not the quantity of the evidence but its *quality*. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:50, at p. 8-24.) The evidence must be of " 'ponderable legal significance. . . . It must be reasonable . . . , credible, and of solid value' . . . ." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) "If . . . 'substantial' evidence is present, *no matter how slight it may appear in comparison with the contradictory evidence*, the judgment must be upheld." (*Howard*, at p. 631; italics added.) The evidence supporting the trial court's finding as to the ninth unit satisfies this standard, and we affirm that ruling.

#### IV

#### DISPOSITION

That portion of the trial court's judgment awarding damages to Helf based on Pacifica's breach as to the ninth unit is affirmed. That portion of the judgment denying damages as to the other eight units for failure of proof is reversed. The case is remanded for retrial on the issue of damages as to those eight units. Helf is entitled to recover its costs of appeal.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.